United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1902.

124

No. 1156.

THOMAS H. G. TODD, APPELLANT,

vs.

HENRY B. F. MACFARLAND, JOHN W. ROSS, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

No. 1157.

MARY F. ISAMINGER, APPELLANT,

vs.

HENRY B. F. MACFARLAND, JOHN W. ROSS, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

AND

No. 1158.

CAROLINE MYTINGER, APPELLANT,

vs.

HENRY B. F. MACFARLAND, JOHN W. ROSS, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 20, 1901.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

THOMAS H. G. TODD, Appellant,
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HENRY B. F. MACFARLAND ET AL. } No. 1156.

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CAROLINE MYTINGER, Appellant,
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a Supreme Court of the District of Columbia.

In re EXTENSION OF SHERMAN AVENUE. No. 555, District Court.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition.*

Filed May 31, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In re EXTENSION OF SHERMAN AVENUE. District Court, No. 555.

To the supreme court of the District of Columbia, sitting as a district court:

The petition of John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, respectfully shows as follows:

1. That Congress, by an act approved March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes," directed that "within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they

are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet," under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia.

2. That a map of the proposed extension and widening of Sherman avenue, showing the number and designation of lots affected,
2 the names of the owners thereof, and the areas of land required for the extension, has been prepared, and a copy thereof is hereto annexed as part of this petition, marked "Exhibit D. C. No. 1."

3. That said act provides, among other things, "that of the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of said Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines of the east and west sides of Sherman avenue as widened and extended: Provided, that no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Wherefore your petitioners pray this honorable court to direct the marshal of the District of Columbia to summon a jury of seven judicious disinterested men, not related to any party interested, and to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders may be made and proceedings had as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end
3 that a permanent right of way for the public over the said lands may be obtained and secured for the aforesaid extension and widening of Sherman avenue, and they will ever pray, etc.

JOHN B. WIGHT,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Petitioners.

Instructions to Jury.

Filed February 20, 1900.

In the Supreme Court of the District of Columbia.

In re EXTENSION OF SHERMAN AVENUE. No. 555.

1. The jury are instructed that if they find any owner has dedicated to the public use the necessary land for the widening of Sherman avenue, according to the map on file in this
Refused. case, then the remaining land of said owner or that part of same lying directly east or west of the part dedicated will be exempt from assessment for benefits.

But if said jury shall find that such owner has not dedicated land the entire length of his frontage upon said avenue, then so much of said frontage from which there have been no dedication shall be subject to an assessment as if such owner had made no dedication at all.

2. The jury are instructed the word dedicated, in the fifth section of the act under which these proceedings are instituted, means
4 the voluntary donation or giving away of the land necessary for the widening of Sherman avenue, and not the selling or conveying of same to the United States or the District government for a consideration. Therefore if they find that any
Refused. owner of such land has received a valuable consideration for same, and based upon such consideration they sold, conveyed, or designated the land necessary to widen said avenue, then they are not exempt from assessment for benefits.

3. The jury are instructed that in assessing the benefits upon the several pieces or parcels of land lying upon each side of Sherman avenue to a distance of three hundred feet from the building line of same as widened, they shall take into consideration the situation of each piece or parcel of land as a separate piece or parcel and not in conjunction with any other and without regard to ownership thereof, and levy such assessments equally, in proportion to the benefits received, and in doing so they are not at liberty
Refused. to take into consideration any assessment that has been or that may hereafter be made by reason of the opening or widening of any other street or thoroughfare.

4. The jury are instructed that in estimating the damage to be allowed the owner of any piece or parcel of land taken for the extension and widening of said avenue they are not
Granted. confined to the land actually taken. Therefore, if they find that by reason of the extension and widening of said avenue the remaining part of any lot or tract of land of any owner will be damaged, or any building thereon will be damaged or destroyed, they shall take that circumstance into consideration and make due allowance for same.

The jury are instructed that in receiving evidence as to
5 the value of property to be condemned for the purposes of the widening Sherman avenue it is improper that they should receive hearsay evidence, such as the written
Refused. proposal of an owner or proposing purchaser for the purchase or sale of such property made between the parties, unless there are produced before them the parties themselves who may have made such proposals, so that the parties in interest may have the opportunity to examine such parties.
(Tobriner.)

The jury are instructed that where any written proposals or assent of any owner of any piece or parcel of land here-
Granted. tofore offering or agreeing to sell the same shall be presented in evidence for the purpose of indicating its value at the date thereof it will be proper for the jury to summon before them and examine such owner in *consideration* with such written proposal or assent, and it will be competent for the person against whose property such proposal or assent is intended to operate to cross-examine such owner as to the circumstances attending such writing.

1. The jury are instructed that no assessment can
Refused. lawfully be made in these proceedings against any piece or parcel of ground.

2. The jury are instructed that no assessment
172 U. S., 282. can lawfully be made in these proceedings against any piece or parcel of ground, because the law under which these proceedings are had undertakes to fix, at the meer will of Congress, the ratio of expense to be put upon the owners of property.

3. The jury are instructed that no assessment
172 U. S., 291. can lawfully be made in these proceedings against any piece or parcel of ground, because the total
6 amount of assessments required to be made by the terms of the law under which these proceedings are had rests
Refused. upon a basis that excludes any consideration of benefits.

4. The jury are instructed that no assessment can lawfully be made in these proceedings against any piece or parcel
Refused. of ground, because the law under which these proceedings are had prescribes no rule for the apportionment of benefits.

5. The jury are instructed that no assessment can lawfully be made in these proceedings against any piece or parcel of ground, because the assessments required to be made by the
Refused. terms of the law under which these proceedings are
172 U. S., 287. had are not apportioned by any rule capable of producing reasonable equality.

6. The jury are instructed that no assessment can lawfully be

made in these proceedings against any piece or
172 U. S., 284. parcel of ground, because the ratio of distribution of assessments among the several lots subject to assessment under the terms of the law under which these proceedings are had is left by said law to the judgment of the jury.

7. The jury are instructed that no piece or parcel of ground that does not abut on Sherman avenue, or the extension
Refused. thereof, as provided in the law under which these proceedings are had, is subject to assessment in these proceedings, and that, for the purposes of these proceedings, to abut on Sherman avenue means to bound on, or border on, said avenue.

7 8. The jury are instructed that ground from which there is no right of way to Sherman avenue, except over an
Refused. avenue, street, or other highway, does not abut on Sherman avenue, and is not subject to assessment in these proceedings.

9. The jury are instructed that ground of one person separated from Sherman avenue by intervening ground of another
Refused. person does not abut on Sherman avenue and is not subject to assessment in these proceedings.

10. The jury are instructed that a lot fronting on a street or avenue other than Sherman avenue, and separated
Refused. from Sherman avenue by one or more intervening lots, does not abut on Sherman avenue, and is not subject to assessment in these proceedings.

11. The jury are instructed that the amount that can be lawfully assessed in these proceedings against any piece or
172 U. S., 294. parcel of ground must be measured or limited by
Refused. the special benefits accruing to it from the proposed extension and widening of Sherman avenue, and that special benefits means benefits that are not shared by the general public.

8 *Verdict of Jury.*

Filed December 4, 1901.

Block.	Lot.	Area.	Per ft.	Award.	Owner.
*	*	*	*	*	*
16	16	1,500.0	.....	$600.00	Caroline Mytinger.
.....	17	1,500.0	.....	$600.00	" "
*	*	*	*	*	*
6	12	1,000.0	.....	$450.00	Jas. M. Thompson.
.....	13	1,000.0	.....	$400.00	" "
.....	14	1,000.0	.....	$400.00	" "
*	*	*	*	*	*
18	11	1,500.0	.....	$750.00	Thos. H. G. Todd.
.....	12	1,500.0	.....	$750.00	" "
*	*	*	*	*	*
8	14	1,000.0	.....	$500.00	Thos. H. G. Todd.

Todd and Brown's subdivision.

8½

Block.	Lot.	Area.	Assessment.	Owners.
*	*	*	*	*
16	of 16	6,000	$500.00	Caroline Mytinger.
.....	of 17	6,000	$500.00	" "
*	*	*	*	*
6	of 12	5,606	$425.00	James M. Thompson.
... .	of 13	5,606	$360.00	" "
.....	of 14	5,606	$360.00	" "
*	*	*	*	*
18	of 11	6,000	$500.00	Thos. H. G. Todd.
.....	of 12	6,000	$500.00	" "
*	*	*	*	*
8	of 14	5,606	$420.00	Thos. H. G. Todd.

Todd and Brown's subdivision.

9 *Exceptions of Thos. H. G. Todd et al.*

Filed July 22, 1901.

In the Supreme Court of the District of Columbia.

In re EXTENSION AND WIDENING OF SHERMAN AVENUE. District Cause, No. 555.

Now comes Mary F. Isaminger, owner of lots 12, 13, 14, and 15, in block 6, in Todd and Brown'- subdivision, and objects to the confirmation of the assessment levied by the jury in this cause against said lots of land and premises upon the following grounds:

1st. Because the law under which said assessment is made arbitrarily requires an assessment without regard to benefits, and is therefore unconstitutional and void.

2nd. Because said assessment, as will appear from the records, exceeds the benefits found and is contrary to law.

3rd. Because the verdict of the jury does not find that said property is benefited in any sum whatever.

4th. Because the assessments for benefits as returned by said jury are unequal, irregular, and are not made in accordance with the law made and provided for levying said assessment.

5th. Because the law under which said assessments were levied and are to be collected is unreasonable, evasive, uncertain, and void.

LEO SIMMONS,
Attorney for Exceptant.

10 In the Supreme Court of the District of Columbia.

In re EXTENSION AND WIDENING OF SHERMAN AVENUE. District Cause, No. 555.

Now comes Caroline Mitinger, owner of lots 16 and 17, in block 16, in Todd and Brown'- subdivision, and objects to the confirmation of the assessment levied by the jury in this cause against said lots of land and premises upon the following grounds:

1st. Because the law under which said assessment is made arbitrarily requires an assessment without regard to benefits, and is therefore unconstitutional and void.

2nd. Because said assessment, as will appear from the records, exceeds the benefits found and is contrary to law.

3rd. Because the verdict of the jury does not find that said property is benefited in any sum whatever.

4th. Because the assessments for benefits as returned by said jury are unequal, irregular, and are not made in accordance with the law made and provided for levying said assessment.

5th. Because the law under which said assessments were levied and are to be collected is unreasonable, evasive, uncertain, and void.

LEO SIMMONS,
Attorney for Exceptant.

11 In the Supreme Court of the District of Columbia.

In re EXTENSION AND WIDENING OF SHERMAN AVENUE. District Cause, No. 555.

Now comes Thos. H. G. Todd, owner of lots 14 and 15, in block 8, and lots 11 and 12, in block 18, in Todd and Brown'- subdivision, and objects to the confirmation of the assessment levied by the jury in this cause against said lots of ground and premises upon the following grounds:

1st. Because the law under which said assessment is made arbitrarily requires an assessment without regard to benefits, and is therefore unconstitutional and void.

2nd. Because said assessment, as will appear from the records, exceeds the benefits found and is contrary to law.

3rd. Because the verdict of the jury does not find that said property is benefited in any sum whatever.

4th. Because the assessments for benefits as returned by said jury are unequal, irregular, and are not made in accordance with the law made and provided for levying said assessment.

5th. Because the law under which said assessments were levied and are to be collected is unreasonable, evasive, uncertain, and void.

LEO SIMMONS,
Attorney for Exceptant.

12 *Order Overruling Exceptions, &c.*

Filed October 2, 1901.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF SHERMAN AVENUE. No. 555, Dist. Court.

It appearing to the court that the order *nisi*, confirming the verdict, award, and assessment of the jury filed herein, has been duly published, as therein provided, and that the owners of the lands condemned and the owners of the lands assessed in said verdict have been duly notified of the pendency of these proceedings as provided in said order, and arguments of counsel upon the exceptions to said verdict filed herein having been heard and considered, it is by the court this 2nd day of October, 1901, upon motion of the Commissioners of the District of Columbia, adjudged, ordered, and decreed that the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with a uniform width of one hundred feet, as described in this proceeding and shown on the plat filed herein, be, and the same is hereby, condemned, and that the said exceptions and each of them be, and they are hereby, overruled, and that the aforesaid verdict, award, and assessment as amended by an order passed herein on the 3 day of August, 1901, and by an order passed herein this day, be, and the same hereby is, in all respects finally ratified and confirmed.

T. H. ANDERSON, *Justice.*

13 *Appeal of Thos. H. G. Todd.*

Filed October 22, 1901.

In the Supreme Court of the District of Columbia.

In re EXTENSION OF SHERMAN AVENUE. District Cause, No. 555.

Now comes Thomas H. G. Todd, owner of property upon which certain assessments for benefits have been levied under the proceedings in the above-entitled cause, and appeals to the Court of Appeals from so much of the order passed in this cause on the 2nd day of October, 1901, as overrules his exceptions filed herein and confirms the assessment for alleged benefits against his property.

THOMAS H. G. TODD,
By LEO SIMMONS, *Attorney.*

The clerk will please note the appeal.

LEO SIMMONS,
Attorney for Appellant.

Appeal of Mary F. Isaminger.

Filed October 22, 1901.

In the Supreme Court of the District of Columbia.

In re EXTENSION OF SHERMAN AVENUE. District Cause, No. 555.

14 Now comes Mary F. Isaminger, owners of property upon which certain assessments for benefits have been levied under the proceeding in the above-entitled cause, and appeals to the Court of Appeals from so much of the order passed in this cause on the 2nd day of October, 1901, as overrules her exceptions filed herein and confirms the assessment for alleged benefits against her property.

MARY F. ISAMINGER,
By LEO SIMMONS, *Attorney.*

The clerk will please note this appeal.

LEO SIMMONS,
Attorney for Appellant.

Appeal of Caroline Mytinger.

Filed October 22, 1901.

In the Supreme Court of the District of Columbia.

In re EXTENSION OF SHERMAN AVENUE. District Cause, No. 555.

Now comes Caroline Mytinger, owner of property upon which certain assessments for benefits have been levied under the proceeding in the above-entitled cause, and appeals to the Court of Appeals from so much of the order passed in this cause on the 2nd day of October, 1901, as overrules her exceptions filed herein and confirms the assessment for alleged benefits against her property.

CAROLINE MYTINGER,
By LEO SIMMONS, *Attorney.*

15 The clerk will please note this appeal.

LEO SIMMONS,
For Appellant.

Order Extending Time to File Record.

Filed November 29, 1901.

In the Supreme Court of the District of Columbia.

In re EXTENSION AND WIDENING OF SHERMAN AVE. District Cause, No. 555.

Upon motion of the attorney for Thomas H. G. Todd, Mary F. Isaminger, and Caroline B. Mitinger, and by consent of the attorney for the District of Columbia, it is this 29th day of November, 1901, ordered that the time for filing the record for the appeal in this case in the Court of Appeals be, and the same is hereby, extended to the 22nd day of December, 1901.

A. B. HAGNER, *Justice.*

I consent.

A. B. DUVALL, *Attorney.*

16 *Order for Preparing Transcript on Appeal.*

Filed December 4, 1901.

In the Supreme Court of the District of Columbia.

In re EXTENSION AND WIDENING OF SHERMAN AVENUE. District Cause, No. 555.

The clerk in preparing the transcript for the appeal by Thomas H. G. Todd, Mary F. Isaminger, and Caroline E. Mytinger will include the following:

1st. Petition of the Commissioners of the District of Columbia, *without map.*

2nd. Instructions to jury.

3rd. Verdict of jury in so far only as it relates to lots 16 and 17, in block 16; lots 12, 13, and 14, in block 6; lots 11 and 12, in block 15; lots 11 and 12, in block 18, and lot 14, in block 8, in Todd and Brown's subdivision.

4th. Exceptions of Thomas H. G. Todd, Caroline E. Mytinger, and Mary F. Isaminger.

5th. Decree overruling exceptions and final ratification.

6th. Appeal and papers in relation thereto.

LEO SIMMONS,
For Appellants.

Memorandum.

October 22, 1901.—Appeal bond filed.

17 UNITED STATES OF AMERICA, *District of Columbia,* } ss:

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 16, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 555, District court, *In re* Extension of Sherman Avenue, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 16th day of December, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

18 In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION AND WIDENING OF SHERMAN AVENUE.

We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet, as shown on the plat or map filed with the petition herewith, as set forth in Schedule One, hereto annexed as a part hereof.

And we, the jury aforesaid, in accordance with the act of Congress approved March 3d, 1899, for the extension and widening of said avenue, do hereby assess the sum of $77,293.50, being one-half of the damages as aforesaid as awarded in Schedule One, hereto annexed, against those pieces or parcels of ground abutting on both sides of said Sherman avenue and the extension thereof, as provided by said act, to a distance of three hundred feet from the building lines on the east and west sides of said Sherman avenue as widened and extended, which we find will be benefitted by the widening and extension of said avenue, as set forth in Schedule Two, which is hereto annexed and made a part hereof.

Witness our hands and seals this first day of May, A. D. 1900.

HENRY F. BLOUNT.	[L. S.]	ROB'T I. FLEMING.	[L. S.]
E. S. PARKER.	[L. S.]	NOBLE D. LARNER.	[L. S.]
		GEO. W. MOSS.	[L. S.]
		HARRY B. PARKER.	[L. S.]

19 I agree fully with my colleagues of the jury with regard to the damages awarded for property taken, but regret that I

cannot agree with the majority of them on the question of an equitable apportionment among the several pieces of land of the gross amount assessed as benefits and needed to meet the award for damages.

A. D. HAZEN.

It is hereby stipulated and agreed between the attorneys for the parties to cases of Todd *vs.* The Commissioners of the District of Columbia, No. 1156; Isaminger *vs.* Same, No. 1157, and Mytinger *vs.* Same, No. 1158, now pending in the Court of Appeals, that the above paper, being a copy of the signed verdict of the jury & filed in District cause No. 555, may be included in the record in said cases and become a part of same.

A. B. DUVALL AND
ARTHUR H. O'CONNOR,
Att'ys for Appellees.
LEO SIMMONS, *For Appellant-.*

[Endorsed:] Nos. 1156, Todd *vs.* D. C.; No. 1157, Isaminger *vs.* D. C.; No. 1158, Mytinger *vs.* D. C. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Jan. 21, 1902. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1156, Thomas H. G. Todd, appellant, *vs.* Henry B. F. Macfarland *et al.*; No. 1157, Mary F. Isaminger, appellant, *vs.* Henry B. F. Macfarland *et al.*, and No. 1158, Caroline Mytinger, appellant, *vs.* Henry B. F. Macfarland *et al.* Court of Appeals, District of Columbia. Filed Dec. 20, 1901. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia

THOMAS H. G. TODD,
vs.
HENRY B. F. MACFARLAND ET AL. } No. 1156.

MARY F. ISAMINGER,
vs.
HENRY B. F. MACFARLAND ET AL. } No. 1157.

CAROLINE MYTINGER,
vs.
HENRY B. F. MACFARLAND ET AL. } No. 1158.

BRIEF FOR APPELLANT.

LEO SIMMONS,
For Appellant.

LAW REPORTER PRINT, WASHINGTON, D. C.

IN THE

Court of Appeals of the District of Columbia

THOMAS H. G. TODD,
vs.
HENRY B. F. MACFARLAND ET AL. } No. 1156.

MARY F. ISAMINGER,
vs.
HENRY B. F. MACFARLAND ET AL. } No. 1157.

CAROLINE MYTINGER,
vs.
HENRY B. F. MACFARLAND ET AL. } No. 1158.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This proceeding was instituted by the Commissioners of the District of Columbia, in the Supreme Court of the District of Columbia, sitting as a District court, for the condemnation of certain lands needed for the widening and extension of Sherman avenue, under the act of Congress approved March 3, 1899. The provisions of the act material to the consideration of this appeal are the following:

"Sec. 5. That within ninety days after the approval of this act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition on the Supreme Court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue, from Florida avenue to Whitney avenue, with the uniform width of one hundred feet."

"That the amount found due and awarded for damages for and in respect of the land condemned under this act for the extension and widening of Sherman avenue not less than one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

"Sec. 9. That the proceedings for the condemnation of the lands as provided for in this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provided for the condemnation of lands in said District of Columbia for public highways."

And a further provision in the act of 1889 is that the awards for damages should not be paid until the assessments for benefits were levied and confirmed. That when the benefits were confirmed—

> "they shall severally be a lien upon the land assessed, and be collected as a special improvement tax in the District of Columbia, and shall be payable in five equal instalments, with interest at four per centum per annum until paid."

On the 22d day of July, 1901, the appellants, who own certain parcels of land affected by the proposed widening and extension of Sherman avenue, filed exceptions to the verdict, award and assessment of the jury (Rec., p. 6). These exceptions were overruled and an order entered on the 2d day of October, 1901, whereby the verdict of the jury was in all respects finally ratified and confirmed. From this order the present appeal is taken.

ASSIGNMENT OF ERRORS.

1st. The court erred in confirming the verdict of the jury of seven and in not ordering a jury of twelve.

2d. The court erred in not sustaining the appellants' objection to the act of Congress of March 3, 1899, for want of certainty in the assessment clause thereof, and in not holding that said act was void for uncertainty.

3d. The court erred in overruling the exceptions of the appellants, and in not setting aside and vacating same and holding said assessments illegal, null and void.

This court having decided, in the case of Brown et al. *vs.* MacFarland et al. No. 1142, January term, 1902, that the verdict from which this appeal was taken should have been set aside and a new jury summoned, by reason of the exceptions and objections to said verdict, I deem it unnecessary to say anything in relation to the first assignment of error, inasmuch as the decree of the court below in this case must be reversed upon the grounds set out in said opinion.

But special stress is laid upon the questions raised in the

second and third assignments of error, namely, the uncertainty of the act of Congress under which said assessments were levied. This question of law was specifically raised in the court below by the fifth exception of the appellants (Rec., pp. 6 and 7), and is urged for the reason that if the court should find said exceptions well taken, it would avoid and prevent any further proceeding relative to these assessments or any future assessment under the act in question. The act referred to known as an act to widen and extend Sherman avenue, approved March 3, 1899, has the following provision in relation to the assessments for benefits:

> " When the said benefits shall be confirmed they shall severally be a lien upon the land assessed and be collected as special improvement tax in the District of Columbia, and shall be payable *in five equal installments, with interest at four per centum per annum until paid.*

The assessments referred to, and which were attempted to be levied, necessarily depend for validity upon the assessing clause of said statute, and if the enactment under which the assessments were levied (or are to be levied) is incapable of enforcement by reason of any omission or mistake in the wording thereof, then it is necessarily inoperative and void. For certainly a statute that can not be enforced, is no law at all.

The wording of the act, "payable in five equal installments," means nothing. There is nothing certain about it. Five equal installments may mean installments of a day, week, month, year, ten or a hundred years. Certainly no one could be required to pay the tax at any time, because the amount attempted to be levied as a tax will never be due. If the knowledge of what was intended can not be

gained or ascertained from the statute itself, there is no way to aid it, and therefore such enactments must fail for want of certainty. There is no time mentioned for the payment of the first, second, third, or fourth installment of the alleged tax. Such being the case, when could payment be legally demanded? STATUTES MUST BE CAPABLE OF CONSTRUCTION AND INTERPRETATION, OTHERWISE THEY ARE VOID.

> "The court must use every authorized means to ascertain and give it an intelligible meaning, but if after such efforts it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply or make one. The court may not allow conjectural interpretatians to usurp the place of judicial exposition. There must be a competent and efficient explanation of the legislative will."
>
> State *vs.* Partlow, 91 N. C. 550.

"Acts of the legislature should be plain and not couched in such a way that they can not be understood and readily construed."

Hughes case, 1 Bland, 46.

Endlich on Stat. 24, and case cited.

McCondville *vs.* Mayor of Jersey City, 39 N. J. 38.

Ward *vs.* Ward, 37 Tex. 389.

Commonwealth *vs.* Bank, 3 Watt. and Serg. (Pa.) 173; 23 Am. & E. E. of Law (1st Ed.), 301, note.

See also 57 Mo. 25.

"Whether a statute be a public or private one, if the terms in which it is couched be so vague as to

> convey no definite meaning to those whose duty it is to execute it, either ministerally or judicially, it is necessarily inoperative."
>
> Drake *vs.* Drake, 4 Dev. N. C. 110.

In the case of Blanchard *vs.* Spirges, 3 Sum. 280, a case wherein the time for expirations of a patent was extended, the act referred to a patent issued on a different date and it had a number different from the one thought to be intended, the court said, Story, J:

> "The descriptive words constitute the very essence of the act, unless the description is so clear and accurate as to refer to the particular thing intended, and be incapable of being applied to any other, the mistake is fatal.
>
> "On the whole, although I can not doubt, as a private man, what patent was intended to be renewed by Congress, yet I do feel feel great doubt whether judicially, I am at liberty to depart from the very words of the act of Congress to correct a mistake not apparent upon the face of the act when the mistake when corrected, will still leave another doubt behind it, and that whether I do not, by such correction, depart from the intention of Congress manifested."

In the case of United States *vs.* Union Pacific R. R. Co., 91 U. S. 85, the court said:

> "In support of this construction, it is sought to give the word 'maturity' a double signification applying it to each payment of interest as it falls due, as well as to the principal. But this is extending the operation of words by a forced construction beyond their natural and ordinary meaning, which is contrary to all legal rules. Courts can not supply omissions in legislation, nor afford relief because they are supposed to exist. 'We are bound,' said Justice Buller, in an early case in the King's Bench, 'to take the act of Parliament as they have made it;

> a *casus omissus*, can, in no case, be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not.'"
>
> Jones *vs.* Smart, 1 Term. Rep. 44.

Lord Chief Baron Eyre, in the case of Gibson *vs.* Minet (1 H. Bl. 569–614), said:

> "I venture to lay it down as a general rule, respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, that the words *may* bear the sense, which, by construction, is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them. This rule is as applicable to the language of a statute as to the language of a deed."

And in the case of Hobbs *vs.* MacLeon, 117 U. S. 567, the court said:

> "When a proposition is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. We are bound, says Mr. Justice Buller, in Jones *vs.* Smart, 1st T. R. 44, to take the act of Parliament as they have made it. And Mr. Justice Story, in Smith *vs.* Rines, 2 Summ. 354–355, observes: 'It is not for the courts of justice proprio marte to provide for all the defects or mischief of imperfect legislation.'"
>
> See, also, Knight *vs.* Burwell, 12 A. & E. 460.
>
> Lamon *vs.* Eiffe, 3 Q. B. 910.
>
> Bloxam *vs.* Elsee, 6 B. C. 169.
>
> Bartlett *vs.* Morris, 9 Port. Ala. 266.
>
> Grace *vs.* Collector, 79 Fed. Rep. 318.

And in the case of United States *vs.* Goldenburg, 168 U. S. 102, the court said:

> "No mere omission, no mere failure to provide for contingences, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.
>
> "Where the language is precise and unambiguous, but at the same time incapable of reasonable meaning, the act is consequently inoperative; a court is not at liberty to give the words, on merely conjectural grounds, a meaning which does not belong to them. In other words, where the language of a statute is so devoid of certainty as to render it impossible to ascertain the result intended to be achieved, it can not be assumed that it was intended to give the court, as the interpreter of the statute in the last resort, power to control the event."
>
> Endlich on Interpret. of Stat., Sec. 24, and cases cited.

> "Thus, where an Act made warrants of attorney to confess judgment void as against the assignee of the bankrupt, if not filed within 21 days from execution, or unless judgment was assigned 'or' execution was 'issued' within the same period, the Court of Queens Bench refused to alter 'or' into 'and' and 'issued' into 'levied;' though the passage was unmeaning as it stood, and the proposed alteration would have given it effect, which, because rational, was probably, but only conjecturally, the effect intended by the legislature."
>
> Green *vs.* Wood, 7 Q. B. 178.

In the case of Ward *vs.* Ward, 37 Tex. 389, (see page 392,) referring to a statute that was incapable of enforcement, the court said:

> " We hesitate, and consider well, any judgment of ours which declares unconstitutional or void an act

> of the legislature, paying due reference to the learning and wisdom of that branch of the Government. But when we find ourselves totally unable to administer a law, by reason of its uncertainty or ambiguity, or believe it to be unconstitutional, we shall not hesitate to discharge the duty which the law devolves upon us.
>
> "We do not mean to say, by any means, that the act of November 1, 1871, is unconstitutional, but we do say that it is nugatory and void for want of some adequate provision in the law to carry out its execution."

In the case of Rex *vs.* Barnum, 8 B. & C. 59, the court said:

> "Our decision may, perhaps in this paaticular case, *operate to defeat the objects of the 59 G. 3, but it is better to abide by this consequence than to put upon it a construction unwarranted by the words of the act,* in in order to give effect to what we may suppose to have been the intention of the legislature."

And in the case of Maxwell *vs.* State, 40 Md. 273, the court said, in relation to an act of the Maryland legislature:

> "Where the words of the act, as we have said, are plain and unambiguous; the legislature has declared that in the execution of this assessment law, all the property in the State shall be exempt from taxes except what is particularly mentioned.
>
> "It is very probable; nay, we feel quite sure, the legislature intended to say something very different. There has evidently been some mistake or omission, and we are asked to correct the mistake or supply what has been omitted in order to make the expression what we suppose to have been the inten- of the legislature. *We certainly have no power or amthority to do so.*

And in the same case, citing Alexandria *vs.* Worthington, 5 Md. 485, quotes the following words:

> "We are not at liberty to imagine an intent, and bind the letter of the act to that intent; much less can we *indulge in the license af striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence.*

And in another part of the opinion, the court quotes from Smith on Statutory and Constitutional Construction:

> "Courts must not, even to give effect to what they may suppose to be the intention of the legislature, put upon the provision of the statute the construction in support of the words, *even although the consequences should be to defeat the object of the act.*

And again, in the same opinion, citing what was said in Woodbury & Company *vs.* Berry, 18 Ohio, 462:

> "We are satisfied by considerations outside of the language, that the legislature intended to indicate something very different from what it did indicate. But it did not carry out its intention; and we can not take the will for the deed. *It is our legitimate functon to interpret legislation, but not to supply its omission.*"

And in the same case the court said:

> "It requires no argument to prove that a law which exempts from taxation all the property in a State, except a small portion specified in the act, which only is thus by implication made subject to taxation, is unconstitutional and void. Apart from the consideration, that among the property thus enumerated is some which the State has not the power to tax. On this ground, and because the assessment must receive this construction according to its plain and positive expression, it is our duty to declare that it is inoperative. It is evident that a mistake has occurred in drawing the law, something has been omitted, but we

> can not correct the mistake or supply the omission. We are compelled to take the law as the legislature has indicated it. We have no power to change the words or add expressions in order to make it express what we suppose had been the intention of the legislature.
>
> "*If they have failed to express their real intention, it is for them and not for the courts to amend the law and make it express the legislative will.*"

In the case of Commonwealth *vs.* Bank of Penn., 3 Watt & Sergeant's Reports (Pa.), *supra*, the court said, holding that a statute of the Pennsylvania Legislature incorporating a bank, was void for uncertainty;

> "We have seldom, if ever, found the language of legislation so devoid of certainty as in the proviso before us."

And the latter part of same opinion:

> "We are constrained, therefore, to say that no valid election has been held, and none can be held without further legislation."

In the case of Murphy and Coal *vs.* Enery, 77 Md. 86, it was said, affirming Maxwell *vs.* State, *supra*:

> "It seems to be clear that what was intended was that some section of the ordinance referred to should be amended so as to read as set forth in section 2 of that act. But if this construction be adopted the act becomes void for uncertainty, for in the ordinance mentioned in section one of the Act of 1892 there is no provision at all for which section 2 of this act could be substituted. It was doubtless intended to have referred to some other ordinance and it was stated in the argument that the ordinance to which reference should have been made in section one 'was one with a different number, approved on a different day, and relating to a different subject-

> matter.' *But as we are unable to ascertain from anything in the act itself what ordinance the legislature had reference to, the whole act becomes so uncertain that we can not do otherwise than declare it void.*"

It is submitted that the order appealed from should be reversed, and the assessments held null and void, for want of certainty in the law under which they are levied.

LEO SIMMONS,

For Appellant.

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BRIEF FOR APPELLEES.

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Attorneys for Appellee.

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BRIEF FOR APPELLEES.

The respective appellants in the above-mentioned cases have appealed from the order of the Supreme Court of the District of Columbia, holding a District Court, finally confirming the verdict and award of the jury of condemnation, *In Re:* Extension of Sherman Avenue (No. 555 District Court). The proceeding for the extension of Sherman avenue was instituted by the Commissioners of the District of Columbia under the direction of the Act of Congress entitled "An Act for the extension of Pennsylvania Avenue southeast, and

for other purposes," approved March 3, 1899 (30 Stat., 1380). Section 5 of said Act provided as follows:

> "That within ninety days after the approval of this Act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet."

The other relevant provisions of said Act are as follows:

> "Sec. 9. That the proceedings for the condemnation of the lands as provided for in this Act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways; and to provide the necessary funds for the cost of such condemnation proceedings the sum of three thousand five hundred dollars is hereby appropriated out of the funds of the District of Columbia: Provided, That each juror shall receive a compensation of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions of this Act: And Provided further, That no appeal by any interested party from any decision of the Supreme Court of the District of Columbia confirming said assessment or assessments shall delay or prevent the payment of said awards in respect to the property condemned.
>
> "Sec. 10. That payment of the sum or sums of money adjudged to be due and payable for lands

taken under the provisions of this Act shall be made by the Treasurer of the United States, ex-officio Commissioner of the Sinking Fund of the District of Columbia, upon the warrant of the said Commissioners, out of the revenues of the District of Columbia; and a sufficient sum to pay such judgments and awards is hereby appropriated out of the revenues of the District of Columbia.

"Sec. 11. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury; and in determining what amount shall be assessed against any particular piece or parcel of ground the jury shall take into consideration the situation of said lots and the benefits that they may receive from the extension of said avenue and highway.

"Sec. 12. That when confirmed by the Court the assessments shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as is hereinbefore provided."

The case was duly proceeded with and the jury of condemnation on December 4, 1901, filed its verdict, award and assessment as provided in said Act (Rec., 5).

Among the lots assessed for benefits by the jury are certain lots owned by the respective appellants

herein (Rec., 5 and 6). Pending the appeal to the Supreme Court of the United States in Wight et al. vs. Davidson, involving the construction of the Act of Congress of March 3, 1899, respecting the extension of S street, no action was taken to confirm the verdict in the Sherman avenue case until after the disposition of the case in the Supreme Court of the United States, the acts of Congress for the extension of the two streets being identical in terms. The Supreme Court having held the Act of Congress in question constitutional and valid, a motion was made to confirm the verdict and award in the Sherman avenue case, and in response to an order *nisi* the exceptants, the appellants herein, respectively, filed exceptions to the assessments levied by the jury of condemnation (Rec., 6 and 7). These exceptions were heard and overruled, and, by its order of October 2, 1901, the Court ratified and confirmed the verdict, award and assessment of the jury (Rec., 8), and the present appeal is from said order of confirmation.

ARGUMENT.

The first error assigned by the appellants is that the Court erred in confirming the verdict of the jury of seven and not ordering a jury of twelve.

In Brown et al. vs. Macfarland et al., No. 1142, January Term, 1902, this Honorable Court held in an appeal from the order of confirmation in the aforesaid case of the extension of Sherman avenue (No. 555 District Court) that similar exceptions to those taken by the present appellants entitled the parties objecting to a second jury of twelve under chapter eleven R. S. D. C., and that for that reason the verdict should be set aside as to them; and from the order of this Court we have appealed.

By the second and third assignments of error, the appellants assail the Act of Congress of March 3, 1899, and claim that said Act is void because of the uncertainty in Section 12 respecting the time of payment of the assessments. The contention is that because it is provided in said section that the assessments shall be paid "in five equal intallments, with interest at four per centum per annum until paid," the Act of Congress is necessarily inoperative and void because unenforceable.

It is respectfully submitted that this question cannot be reviewed here on the exceptions filed by the appellants. The only exception filed by them which by any possibility could relate to the subject is the fifth exception (Rec. 6). "Because the law under which said assessments were levied and are to be collected is unreasonable, evasive, uncertain, and void." Such a general exception, without further specification, is insufficient to raise the question.

THE ACT OF CONGRESS IS NOT VOID FOR UNCERTAINTY.

This was a proceeding in the District Court; the verdict, award, and assessment of the jury was subject to the confirmation of the Court, and was by it duly confirmed under Section 12, of the Act of Congress. The assessments of the jury when confirmed by the Court became judgments of the Court and liens upon the land assessed. There is no uncertainty here; there is no uncertainty then as to the amount of the assessment; there is no pretense that the jury have not followed the law, and made the assessments according to law. The claim of appellants, however, is that the provision in said section relative to the payment by installments is so uncertain as to be incapable of judicial construction.

It will be observed that the section declares that the assessments, when confirmed by the Court, shall be a lien upon the land assessed "and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid."

Special improvement taxes in the District of Columbia are collected under the Act of Congress approved August 7, 1894 (28 Stat., 248), which provides:

> "One-half of the cost of the assessment work done under the provisions of this Act shall be paid to the Collector of Taxes of the District of Columbia, as follows: One-third of the amount within sixty days after service of notice of such assessment, without interest; one-third within one year, and the remainder within two years from the date of such service of notice. * * * Any property upon which such assessment and accrued interest thereon, or any part thereof, shall remain unpaid at the expiration of two years from the date of service of notice of such assessment shall be subject to sale therefor under the same conditions and penalties which are imposed by existing laws for the non-payment of general taxes; and if any property assessed as herein provided for shall become liable to sale for any other assessment or tax whatever, then the assessments levied under this Act shall become immediately due and payable, and the property against which they are levied may be sold therefor, together with the accrued interest thereon, and the cost of advertising, to the date of such sale."

The applicable provisions of this Act of Congress are to be read into, and form a part of the Act of Congress for the extension of Sherman avenue. And read thus

together, the Court will construe the Act of Congress of March 3, 1899, as authorizing the payment to the Collector of Taxes of the amount of the assessment adjudged by the Court to be due and payable in five annual installments. If the Act is not thus construed, we submit, the consequence is not that the Act of Congress is void, but simply that there is no authority given to the Collector of Taxes to receive payment by installments. The construction we contend for is in accordance with the rule that courts shall give effect, if possible, to all of the words of a statute.

This is not the case of a mere omission from the statute, as counsel for appellants contend. The Act of March 3, 1899, even if it stood alone, could be construed to mean five equal annual installments in view of the stipulation of the rate of four per cent. per annum. But said Act does not stand alone.

The cases cited by appellants do not relate to the question under consideration.

The cases cited from the Supreme Court of the United States clearly have no relevancy. The case of United States vs. Union Pacific R. R. Co. (91 U. S. 85), involved the construction of the words "to pay said bonds at maturity" and the Court said:

> "They imply, obviously, an obligation to pay both principal and interest, when the time fixed for the payment of the principal has passed; but they do not imply an obligation to pay the interest as it accrues, and the principal when due. It is one thing to be required to pay principal and interest when the bonds have reached maturity and a wholly different thing to be required to pay the interest every six months, and the principal at the end of thirty years. The obligations are so different, that they cannot but grow out of the direct words employed; and it is neces-

sary to superadd other words in order to extend the condition so as to include the payment of semi-annual interest as it falls due. Neither on principle or authority is such a plain departure from the express letter of the statute warranted. And especially is this so, when the construction leads to so great an extension of a condition to defeat a grant.

"The failure to perform the condition is cause of forfeiture. If the natural meaning of the words be adopted as the true meaning, there can be no forfeiture until the bonds themselves have matured. On the contrary, if the construction contended for, be allowed, the grants made to the corporation are subject to forfeiture on each occasion that six months' interest falls due and is not met. It would require a pretty large inference to draw from the language used authority to enlarge, in a particular so essential, the terms of a condition assumed by the corporation when it assented to the Act."

The case of Hobbs vs. McLean (117 U. S., 567) involved the question of whether the witnesses admitted by the Circuit Court were not excluded by the terms of the statute, and the Court said:

> "The witnesses admitted by the Circuit Court were not excluded by the terms of the statute (Sec. 858, R. S. U. S.), and the Court said: 'The suit in which they testified was not an action by or against an executor, administrator or guardian. But the counsel for the defendant insists that the policy of the Act applies to suits by or against assignees as well as to suits by or against executors, administrators or guardians, and that we ought to construe the Act so as to include such suits. We cannot concur in this view. The purpose of the Act was to remove generally the old incapacity to testify, imposed on parties or persons interested in the

> suit. This was done by a sweeping provision, subject to certain well-defined exceptions; but the exceptions did not include suits by or against assignees in bankruptcy. We cannot insert the exception. When a provision is left out of a statute, either by design or mistake, of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.'"

The citation from U. S. vs. Goldenberg et al. (168 U. S., 102), at page 8 of appellant's brief, consists of four lines only, and the apparent quotation following these lines is not from that opinion.

In that case the Court was construing a revenue statute which contained two separate clauses, each prescribing a condition. One was, "shall within ten days after, but not before, give notice," and the other, "shall pay the full amount of the duties," etc. In the latter no time is mentioned, and the clauses being independent, there is no grammatical warrant for taking the specification of time from the one and incorporating it in the other. And in that case the Court held: That the primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used; that there were cases in which the letter of the statute was not deemed controlling, but such cases are few and exceptional, and only arise when there were cogent reasons for believing that the letter did not fully and accurately disclose the intent. Then follows the paragraph quoted in appellant's brief. And the Court said:

> "Certainly there is nothing which imperatively requires the Court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances all that can be de-

> termined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition."

It is a common rule of statutory construction that, if the wording of a clause is such as clearly to indicate that it requires correction in order to effectuate the intent of the legislature, the correction will be made either by striking out a word which has inadvertently crept in, or by substituting one word for another.

> Union Ins. Co. vs. U. S., 73 U. S., 6 Wall., 759, 764.
> Endlich Interpretation of Statutes, Secs. 295, et seq., and cases cited.

Another rule of construction is, that if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated.

> Endlich Interpretation of Statutes, Sec. 301.

A comparatively recent instance of the rule that the intent governs the letter is to be found in McKee vs. U. S., 164, U. S., 287.

Even if the Act of Congress was invalid respecting the provision for payment by installments it would not follow that the whole Act was void. It is well settled that if a statute contains invalid or unconstitutional provisions, if the the valid and invalid are capable of separation, only the latter are to be disregarded.

> Albany County vs. Stanley, 105 U. S., 305.
> Packet Co. vs. Keokuk, 95 U. S., 80.

It is respectfully submitted that the Act of Congress is enforceable, and is not void for any uncertainty therein.

ANDREW B. DUVALL,
E. H. THOMAS,
A. H. O'CONNOR,
Attorneys for Appellees.

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SUPPLEMENTAL BRIEF FOR APPELLEES.

POINT SUBMITTED BY THE APPELLEES, IN THE ABOVE ENTITLED CASES, IN ADDITION TO THEIR BRIEF HERETOFORE FILED.

It was conceded by the briefs filed both for appellants and appellees in the above-entitled cases that these cases might be determined upon the precedent of Brown and Wal-

lach vs. Macfarland et al (No. 1142), decided by this Court at the January term, 1902.

It is now, however, submitted on behalf of appellees that the decision in that case cannot determine these cases. The appeal in No. 1142 was from both the award of damages and the assessment of benefits. In these cases no exception is taken to the verdict so far as the awards are concerned, but they are here on appeal from the final order of the court below confirming assessments for benefits made by the jury.

The Act of Congress under which thse proceedings were instituted and prosecuted is entitled "An Act for the extension of Pennsylvania avenue southeast, and for other purposes," approved March 3, 1899. In the first eight sections of said Act provisions are made for the institution of proceedings by the Commissioners of the District of Columbia for the condemnation of land for the extension of several different streets, including Sherman avenue. Section 9 provides:

> "That the proceedings for the *condemnation of the lands*, as provided for in this Act, shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the *condemnation of lands* in said District for public highways."

As to that part of the proceeding which is confined to the condemnation of land, we still concede that this Court has determined that any party dissatisfied with the verdict of the jury of seven is entitled under the provisions of Chapter 11 to a new jury of twelve. It will be noticed that in such event the verdict of the jury of twelve is final, and no appeal lies therefrom. Nor does it appear that the Act of 1899 contemplates the confirmation by the Court of such a verdict. Section 11, R. S., D. C., was a proceeding merely to condemn the land and award damages therefor. No pro-

vision was made therein for the assessment of benefits. Therefore, the Act of March 3, 1899, provided for the confirmation by the Court of the assessments of benefits made by the jury in the following words: "That when confirmed by the Court the assessments shall severally be a lien upon the land assessed." (Sec. 12, Act of 1899.) The last proviso of Section 9 of said Act is as follows:

> "That no appeal by any interested party from any decision of the Supreme Court of the District of Columbia confirming said assessment or assessments shall delay or prevent the payment of said awards in respect to the property condemned."

This Honorable Court has held that as to the *award of damages*, the remedy of the party dissatisfied with the verdict of the jury of seven is the provision for a hearing before a new jury of twelve, whose verdict is final; but we maintain that the *assessment for benefits* is to be confirmed by the Court subject to a right of appeal by any interested party, and that it is such an appeal that is now presented to the Court in these cases.

We, therefore, respectfully submit that the decision of this Court in the case of Brown and Wallach vs. Macfarland et al (No. 1142), cannot determine these cases.

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